Legislative Summary LS-428E

BILL C-61: THE FIRST NATIONS GOVERNANCE ACT

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LEGISLATIVE HISTORY OF BILL C-61

HOUSE OF COMMONS	
Bill Stage	**Date**
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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-61: THE FIRST NATIONS GOVERNANCE ACT*

Bill C-61, an Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendment to other Acts, was introduced in the House of Commons on 14 June 2002.

The proposed stand-alone First Nations Governance Act, to apply to more than 600 *Indian Act* First Nations communities or Indian bands,(1) sets out requirements related to "governance" codes in matters of leadership selection, administration of government, and financial accountability. Communities must either adopt codes containing prescribed rules in these areas or, should any of the codes not be developed, become subject to a default regulatory regime in relation to that subject matter. Bill C-61 also, *inter alia*, defines bands' legal capacity; redefines their law-making authority; repeals legislation exempting *Indian Act* provisions from the *Canadian Human Rights Act*; and makes consequential amendments to the *Indian Act*.

On 17 June, following first reading debate, the bill was referred to the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources (Committee). Reference prior to second reading authorizes the Committee to undertake broader study of the bill, given that its principle has not yet been approved, and to entertain a wider range of amendments, including proposals to modify the bill's scope.

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* Notice: For clarity of exposition, the legislative proposals set out in the Bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) Only First Nations communities with self-government legislation in place – the Nisga'a and Sechelt in British Columbia, the Cree of northern Quebec, and a number of Yukon First Nations groups – are expressly excluded from the bill's application by clause 35.

BACKGROUND

A. General Considerations

Subsection 91(24) of the *Constitution Act, 1867* granted Parliament legislative authority over "Indians, and Lands reserved for the Indians." The first consolidated *Indian Act* was enacted in 1876. Today, as the principal instrument of federal jurisdiction over First Nations, that Act continues to define and give the government, through the Department of Indian Affairs and Northern Development (DIAND), enormous powers over most aspects of the lives and affairs of registered or status "Indians" belonging to "bands" and living on and off "reserves".(2)

The *Indian Act*'s essential flaws have long been acknowledged.(3) First Nations object to its inherent paternalism, while government officials acknowledge its limitations as a framework for modern relations with First Nations. Although it has served as an assimilative tool, however, the *Indian Act* has also provided certain protections. These conflicting roles, together with differing views of federal authorities and First Nations on the nature and scope of the inherent right of Aboriginal self-government under section 35 of the *Constitution Act, 1982*,(4) have intensified the complexities of reforming the *Indian Act*.

Appendix A contains a brief review of selected aspects of the *Indian Act*'s development through the most recent reform initiative in 1996.

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(2) Under subsection 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5: an "Indian" is a person who is either registered or entitled to be registered under the legislation; the term "reserve" means a tract of land to which the federal Crown holds title but that is "set apart by Her Majesty for the use and benefit of a band"; a "band" is a "body of Indians" for whose common use and benefit lands have been set apart or moneys are held, or that is declared to be a band by the Governor in Council. A "council of the band" is selected under the Act's electoral regime, or according to band "custom".

(3) Problems with the *Indian Act* have been identified in reports of governments, First Nations and other organizations. See, for example, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Volume 1, *Looking Forward, Looking Back*, Chapter 9: "The *Indian Act*" (Ottawa, Ministry of Supply and Services, 1996), pp. 281-319.

(4) Subsection 35(1) recognizes and affirms "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada", including the Indian, Inuit and Métis peoples. In August 1995, the government issued a policy statement recognizing the inherent right of Aboriginal self-government as an existing Aboriginal right under section 35.

B. Jurisdictional and Demographic Considerations

Federal policy maintains that the government's core responsibilities under subsection 91(24) of the Constitution are to on-reserve First Nations people and Inuit,[5] while off-reserve First Nations persons, as provincial residents, fall within provincial jurisdiction. This policy has served as a source of friction among federal and provincial levels of government, with the latter typically asserting that the former has primary responsibility for all Aboriginal persons. For their part, First Nations groups have long been concerned about compromised access to programs and services from either level of government for the off-reserve registered population.[6]

First Nations demographics are worth noting. According to DIAND figures for the year 2000, out of a total registered First Nations population on- and off-reserve of 675,499, 58% resided on reserves and 42% off-reserve, up from 29% in 1985. The net migration flow of First Nations people to reserves is nevertheless projected to continue, with the on-reserve population expected to exceed 60% within a decade. In 2000, 48% of the registered population were under 25.[7] DIAND documentation indicates that First Nations communities vary greatly in population – from 32 having more than 2000 members to nearly 400 having fewer than 500, including more than 140 with fewer than 100 – and location, ranging from highly urban to extremely remote.[8]

FIRST NATIONS AND GOVERNANCE

A. The 1999 *Corbiere* Decision

The *Indian Act* defines a band's "electors" as persons of at least 18 years of age who are registered as members on a band list and not disqualified from voting at band elections.

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(5) In its 1939 decision *Re Eskimo*, the Supreme Court of Canada ruled that Inuit were "Indians" within the meaning of subsection 91(24).

(6) Additional information on this issue may be found in a 2001 document prepared by Tonina Simeone entitled *Federal-Provincial Jurisdiction and Aboriginal Peoples*, TIPS-88E, Parliamentary Research Branch, Library of Parliament, on-line at http://lpintrabp/apps/tips/tips-cont.asp?Language=E&Heading=14&TIP=95.

(7) DIAND's *Basic Departmental Data 2001*, March 2002, available on-line at http://www.ainc-inac.gc.ca/pr/sts/bdd01/bdd01_e.pdf.

(8) *Overview of First Nations in Canada*, Presentation to the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, 21 February 2002.

Subsection 77(1) of the *Indian Act* further stipulated that in order to vote in band council elections held under the *Indian Act*, members must be "ordinarily resident on the reserve". In May 1999, in *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*,[9] the Supreme Court of Canada found this provision contrary to the equality rights of off-reserve band members under section 15 of the *Canadian Charter of Rights and Freedoms*, and suspended its decision to enable government compliance with it. The Court noted the broader implications of the *Indian Act*'s restrictive definition of "elector" in matters of band governance, and suggested that a preferable electoral process would be one that balanced the rights of on- and off-reserve members.

DIAND's December 1999 response called for a two-phase process. The first involved changes to election and referendum regulations that came into effect in October 2000. The second, longer-term phase called for "working with Aboriginal organizations to develop *Charter*-consistent long-term sustainable solutions to address the *Corbiere* decision and future challenges to provisions of the [*Indian Act*]":[10]

> This statutory renewal will be informed by consultations with Aboriginal organizations, the AFN/INAC Joint Initiative on Policy Development (Lands and Trusts Services),[11] the results of the study to be undertaken by the Special Representative[12] who is looking at the legislative gaps in the [*Indian Act*]..., the review of the *Canadian Human Rights Act*,[13] and upcoming decisions from the Supreme Court of Canada.

B. First Nations Governance Initiative: Government Action

The January 2001 Speech from the Throne contained government commitments "to [strengthen] its relationship with Aboriginal people" and to "support First Nations

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(9) [1999] 2 S.C.R 203, on-line at http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol2/html/1999scr2_0203.html.

(10) DIAND, *Backgrounder*, "Consultations on the *Corbiere* Decision", 9 December 1999, Ottawa. On-line at http://www.ainc-inac.gc.ca/nr/prs/s-d1999/99172bk2.html.

(11) Since 1998, this joint process has been devoted to creating a framework for the eventual transfer to First Nations of greater control over matters within the Lands and Trusts Services Sector that covers approximately 80% of the *Indian Act*.

(12) In May 2000, the Minister appointed a SR to investigate and make recommendations related to the general absence of protection for First Nations women under the *Indian Act*. Her report, tabled with the Minister in January 2001, has not been made public to date.

(13) Since its enactment in 1976, section 67 of the CHRA has provided that "[n]othing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act".

communities in strengthening governance, including implementing more effective and transparent administrative practices".

On 30 April 2001, with Cabinet approval to undertake an incremental approach to reforming the *Indian Act*, Minister Robert Nault formally initiated "Communities First: First Nations Governance", described as a multi-phase process for the development of "governance"[14] legislation. Over the ensuing months, meetings were held across the country to ascertain the views of on- and off-reserve First Nations groups and individuals on the planned governance initiative (FNGI). DIAND figures indicate that from May through November 2001, about 10,000 individuals took part in this initial process, whether at one of over 400 meetings across the country, through questionnaires or other means.

According to DIAND documentation provided to participants, "[t]he objective of [the FNGI] is to provide the tools many First Nation leaders and individuals have called for to run their communities efficiently and fairly":

> Legislated governance under the [*Indian Act*] is not about nation-to-nation governance, or the Inherent Right to self-government under the Canadian Constitution, or the fulfilment of treaties ... [and] is also not intended to change the special, historic relationship that exists between First Nations and the federal government.
>
> The way we are using the term "governance" means how a community is run and the rules that apply in its day-to-day operation for the many First Nations who are still under the [*Indian Act*] and will stay there until they choose to take on self-government and/or agreement is reached on the implementation of existing treaties. ... Based on ideas from First Nations and others, new legislation would build on the idea of "effective governance" and could include these general subject matter areas: 1) Legal Standing and Capacity; 2) Leadership Selection and Voting Rights; and 3) Accountability to First Nation Members.[15]

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(14) For a discussion on governance and the distinction between governance and government, see Tim Plumptre and John Graham, *Governance and Good Governance: International and Aboriginal Perspectives* (Ottawa: Institute on Governance, 1999), on-line at http://www.iog.ca/publications/govgoodgov.pdf.

(15) Department of Indian Affairs and Northern Development. "Communities First: First Nations Governance", *Consultation Package*, on-line at http://www.fng-gpn.gc.ca/samp_mat_e.asp. The full selection of First Nations Governance materials can be found at http://www.fng-gpn.gc.ca/index_e.asp.

Status and band membership, First Nations women's concerns relating to land, the delivery of programs and services and broad review of the *Indian Act* were listed among matters not to be covered in the new legislation.

In December 2001, the Minister announced the formation of a nine-person Joint Ministerial Advisory Committee (JMAC), consisting of First Nations and government representatives as well as independent members, "to assist in developing policy proposals for the development of draft legislation", taking into account the results of the prior canvassing of views on the FNGI.

C. Reactions to the FNGI

The Assembly of First Nations (AFN) is a national representative/lobby organization for First Nations people and is particularly closely associated with those on reserve. Although acknowledging the need for broad change to the existing system, the AFN expressed serious concerns about the FNGI, rejecting the phase one process as fundamentally flawed and questioning whether the FNGI overall is consistent with the rights, needs and priorities of Canada's First Nations.(16) Several affiliated provincial, regional and local First Nations assemblies, organizations and communities have echoed these views.(17) AFN resolutions calling for a boycott of the FNGI phase one process and for a joint alternative course of action were succeeded by efforts to achieve the latter. These were in turn overtaken, in December 2001, by rejection of a proposed DIAND–AFN co-operative workplan on governance legislation and the *Indian Act*, following which the Assembly's representative withdrew from the Joint Ministerial Advisory Committee. On 28 February 2002, AFN National Chief Matthew Coon Come tabled an AFN alternative to the FNGI with the Committee, describing it as incorporating both the Minister's issues and First Nations priorities.(18)

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(16) AFN documentation concerning the pre-legislation FNGI may be consulted on-line at http://www.afn.ca/Programs/Governance/FederalGovernmentGovernanceAct.htm.

(17) They include the Atlantic Policy Congress of First Nation Chiefs, the Chiefs in Ontario, the Assembly of Manitoba Chiefs, the Federation of Saskatchewan Indian Nations, the Union of British Columbia Indian Chiefs, the First Nations Coalition for Inherent Rights, the Six Nations of the Grand River.

(18) Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, *Evidence*, 28 February 2002, on-line at http://www.parl.gc.ca/InfoComDoc/37/1/AANR/Meetings/Evidence/AANREV42-E.HTM. The *First Nations Plan: First Nations' Governance from a First Nations' Perspective* may be consulted on-line at http://www.afn.ca/02-02-10%20FNplan.pdf.

In a 19 March appearance before the Committee, National Chief Dwight Dorey of the Congress of Aboriginal Peoples (CAP) described his organization as representing "the interests of more than 800,000 off-reserve Aboriginal people living in urban, rural and remote areas".[19] According to Chief Dorey: CAP's decision to participate in the FNGI phase one process reflected responsibility "to get involved in these issues that directly affect us and a significant portion of the people ... we are elected to serve"; declining to take part would have been a disservice to off-reserve First Nations members; although broader changes are necessary in the medium and long term, "some basic reforms to the [*Indian Act*] can be undertaken quickly" along the lines proposed in the FNGI.[20] CAP was represented on JMAC.

On 14 March 2002, President Terri Brown of the Native Women's Association of Canada (NWAC) advised the Committee that her organization, formed in 1974, "is mandated by its national membership to be the national voice for Aboriginal women". Ms Brown indicated that NWAC initially supported a moratorium on the FNGI process, in part in order to clarify its own position, since many issues other than the three advanced by the Minister have an impact on First Nations women. By the time NWAC had considered these matters and decided to request funding in order to participate in the subsequent FNGI process, another organization, the National Aboriginal Women's Association (NAWA) – formed in October 2001 as a research and policy-oriented body on Aboriginal women's issues – was involved in FNGI discussions.[21] NAWA was subsequently represented on the JMAC.

D. Report of the Joint Ministerial Advisory Committee

JMAC's Final Report was tabled with the Minister on 8 March 2002. The Report reviews options for legislative reform in the various areas covered by the FNGI, making recommendations in some areas and not in others where consensus was not reached. Although it

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(19) The AFN and CAP are at odds as to which organization speaks for off-reserve First Nations people.

(20) Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, *Evidence*, 19 March 2002, on-line at http://www.parl.gc.ca/InfoComDoc/37/1/AANR/Meetings/Evidence/aanrev46-e.htm#Int-173817. CAP's FNGI-related documentation is available on-line at http://www.abo-peoples.org/Next/programs/Governance/Governance.html.

(21) For a fuller discussion of this issue, see Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, *Evidence*, 14 March 2002, on-line at http://www.parl.gc.ca/InfoComDoc/37/1/AANR/Meetings/Evidence/aanrev45-e.htm#Int-167313.

is beyond the scope of the present paper to provide an exhaustive review, it may be useful to cite verbatim the Report's accounts of the Minister's instructions to JMAC and of the ensuing broad approach that JMAC concluded is best suited to attaining the FNGI's objectives.

1. Minister's Instructions to JMAC:

The Minister has clearly stated that the amendments:

- must not infringe existing aboriginal or treaty rights;
- must not alter the fiduciary relationship between First Nations and the Crown;
- must be consistent with the *Canadian Charter of Rights and Freedoms*, including section 25 of the *Charter*;
- must maximize the ability of bands to determine their own governance regimes, while providing those who prefer to operate under a statutory regime the ability to do so, and providing basic rules of political and financial accountability to apply to all bands; and
- must not impose requirements on bands that many of them would be unable to fulfil due to lack of resources or capacity, or as a result of small populations.(22)

2. JMAC's Conclusions on Legislative Approach

A Bill should be prepared which will:

- include a Preamble and a statement of purposes to guide the interpretation and implementation of the Act;
- include a non-derogation clause;
- address the legal status and capacity of bands;
- provide statutory or default regimes in respect of leadership selection, governance structures and procedures, and financial accountability to apply to every band that does not choose to design its own regime;
- enable the Governor-in-Council to enact regulations that will provide the details of the default regimes, following an appropriate consultation process;
- enable bands to design their own regimes in respect of leadership selection, governance structures and procedures, and financial

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(22) *Recommendations and Legislative Options ... on the First Nations Governance Initiative*, available on-line at http://www.fng-gpn.gc.ca/JMACFR_M802_e.asp (JMAC Report or JMAC), p. B-4 - 5 of the paper version. Subsequent references will also be to this version.

accountability, provided that certain essential elements are addressed, while leaving to each band the particular way in which those elements are addressed;
- eliminate or reduce the current roles of the Minister and Governor-in-Council in band governance;
- establish an independent institution to assist bands with governance, particularly during the transitional period between enactment of the legislation and the coming into force of the default or band designed regimes, and to replace some of the current functions of the Minister and Governor-in-Council;
- bind the Crown.[23]

DESCRIPTION AND ANALYSIS

The First Nations Governance Act (FNGA or the bill) introduced on 14 June consists of a lengthy preamble and 59 clauses divided into four Parts: Band Governance; Powers of Band Councils; General; and Transitional Provisions, Related Amendments and Coming into Force. The following review considers selected significant elements of the FNGA, with reference to JMAC Report observations and recommendations as well as existing provisions in the *Indian Act*. For purposes of clarity, the vocabulary of that Act and of the FNGA is used throughout,[24] and related provisions in the Bill are discussed together rather than in numerical order. Some overlap may be noted. This review is followed by a brief overview of parts of the *Indian Act* that remain unaffected by the bill, and of principal JMAC Report recommendations that are not contained in Bill C-61.

A. Legislative Approach

In 1997, Bill C-79, the most recent government legislation intended to reform the *Indian Act*, died on the Order Paper. It proposed modifications in a number of areas, but only for those bands choosing to be governed by its optional scheme. Bill C-61 contains no such optional mechanism and will apply to all bands.

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(23) *Ibid.*, p. B-8.

(24) JMAC recommended against changing the term "band" to "First Nation" at this time owing to ongoing debate as to the scope and significance of the latter appellation, and concern that such a change could influence "the outcome of the broader efforts at Nation re-building", *Ibid.*, p. B-6.

The JMAC Report observed that technical challenges may be associated with an incremental approach to reforming the *Indian Act* owing to the interrelated nature of its provisions.(25) It also recommended that legislative changes resulting from the governance initiative "be by way of amendments to the [*Indian Act*] rather than by way of a new, stand-alone statute", in part in order to avoid complexities associated with interlocking statutes and to indicate more clearly "that the amendments are intended to be interim, transitional measures".(26) Although the FNGA does effect consequential amendments to the *Indian Act*, the government has elected to proceed by way of "stand-alone" legislation. Enactment of Bill C-61 will result in most bands being subject to two governing statutes, the *Indian Act* and the FNGA, for different purposes. Bands that are currently or that may become participants in the 1999 *First Nations Land Management Act*,(27) as well as the Mohawks of Kanesatake,(28) will be subject to three interconnected statutes. These dual or triple regimes may entail complex administration and implementation requirements for bands and government.

B. Preamble

The FNGA's substantive provisions are preceded by an eight-paragraph Preamble that will enter the annual statute book as an integral part of the legislation. In recent years statutory preambles seem to be employed more frequently – including in statutes relating to Aboriginal peoples – as a way of establishing a context and rationale for legislation and of underscoring parliamentary intent in enacting it.(29) Preambles are interpretive rather than substantive, and may on occasion be relied upon by courts seeking to resolve ambiguity in the statute they precede.

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(25) *Ibid.*, p. B-4.

(26) *Ibid.*, p. B-9.

(27) S.C. 1999, c. 24. Under this legislation, land-related provisions of the *Indian Act* cease to apply to signatory First Nations communities that adopt prescribed land codes. As of July 2002, 5 of 14 participating communities had done so. In March 2002, the Minister announced the FNLMA process would be opened up to enable additional communities to assume land management jurisdiction.

(28) Under the *Kanesatake Interim Land Base Governance Act*, S.C. 2001, c. 8, specified Kanesatake lands are not subject to the *Indian Act*'s reserve provisions, while provisions not related to reserves continue to apply to Kanesatake Mohawks.

(29) See, for example, the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, S.C. 2002, c. 10; the *Nisga'a Final Agreement Act*, S.C. 2000, c. 7; the *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18; the *Federal Law-Civil Law Harmonization Act*, No. 1, S.C. 2001, c. 4; the *Law Commission of Canada Act*, S.C. 1996, c. 9.

Noteworthy aspects in the preamble to Bill C-61 include:

- a statement underscoring "broadly held Canadian values" such as "representative democracy, including regular elections by secret ballot". It may be noted that over 50% of Indian bands do not fall under the *Indian Act*'s electoral provisions, using "custom" leadership selection processes that may not all involve elections and/or secret voting (par. 2);
- statements relating the absence of governance provisions in the *Indian Act*, and the need for effective governance tools for bands subject to that Act (par. 3-4);
- statements aimed at stressing that the FNGA is not intended to supersede ongoing processes related to self-government[30] (par. 5-6);
- a statement that the exercise of powers under all federal legislation is subject to the *Canadian Charter of Rights and Freedoms*. As the Charter's application to federal legislation is automatic, this statement appears designed to emphasize that the Charter governs band council powers under the FNGA (par. 8).

C. Interpretation and Purpose (clauses 2-3)

Clause 2 contains few definitions, providing that words and expressions in Bill C-61 have the same meaning as in the *Indian Act* unless otherwise indicated. Those worth noting include:

- "band funds": the broad definition of this new term appears to include most if not all sources of revenue generated by bands, while explicitly excluding "Indian moneys" under the *Indian Act*, that is, moneys received or held by the Crown for bands' use and benefit.[31] The scope of this definition suggests that the accountability and financial management provisions at clauses 7 through 10 of Bill C-61 will not be restricted to funds received from DIAND;
- "council": the *Indian Act* defines a band council as either established under its electoral provisions or chosen according to custom. The FNGA's definition will provide that a council is selected by election or custom under new leadership selection measures set out at clause 5, or in default regulations;[32]

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(30) Self-government negotiations, which will presumably continue as they have under the *Indian Act*, cover a range of comprehensive and sectoral initiatives and currently number about 80.

(31) The Minister has suggested that separate legislation may be forthcoming to provide for the transfer of Indian moneys currently held in trust by the Crown to band governments.

(32) The *Indian Act*'s existing definition is replaced to conform to the FNGA (clause 43(2)).

- "eligible voter": this new term means a member of the band, whether on or off reserve, of at least eighteen years of age. Under Bill C-61, an eligible voter's role is essentially restricted to clause 4 code-related procedures. It should be noted that the term "elector", which will remain in the *Indian Act*,(33) contains identical membership and age criteria, but does not refer to on- or off-reserve residence. This may suggest that, while an "elector" is also an "eligible voter" under the FNGA, an off-reserve "eligible voter" may not necessarily be an "elector" for purposes of the *Indian Act*. The distinction may be significant, since "electors" under that Act decide matters such as the validity of land designations and surrenders (section 39).(34) The question of off-reserve members' potentially broader role as "electors" is not dealt with explicitly in Bill C-61 by way of amendments to the *Indian Act* or otherwise.

The purposes of the FNGA are described as: making provision for effective band governance "on an interim basis pending ... self-government"; and enabling bands both to respond to their individual needs and to design their own governance regimes in prescribed subject matters, should they choose to do so (clause 3). These objectives generally correspond to those suggested in the JMAC Report's sample purpose clause, while omitting JMAC's proposal that the legislation aim "to assist bands and band councils to establish the institutional foundation and develop capacities they consider will assist in moving towards a fuller implementation of self-government".(35)

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(33) As modified by clause 43(3) to remove a reference to "band elections" which will no longer take place under the *Indian Act*.

(34) Referring to the discussion under First Nations and Governance, A. The 1999 *Corbiere* Decision, it should be noted that the *Corbiere* decision did not definitively settle the scope of off-reserve band members' entitlement to participate in band affairs. It is therefore not apparent post-*Corbiere* that the term "elector" in the *Indian Act* is to be read as implicitly including off-reserve members for all purposes. In this light, the Supreme Court of Canada's finding that "Aboriginality-residence" is an analogous ground or a "constant marker" of potential discrimination for purposes of section 15 of the Charter remains important.

(35) JMAC Report, p. B-20. See discussion under heading D.1.h, Observations related to governance codes.

D. Provisions Related to Band Governance

1. Governance Codes (clauses 2(3), 4-7, 31-32, 34, 36, 52, 59)

a. Proposal and adoption (clauses 4 and 31)

Clause 4 is new law and plays a pivotal role in the FNGA. It provides, first, that a band council may propose that any or all – or, implicitly, none – of three possible codes in areas of leadership selection, administration of government and financial management and accountability be adopted by the band's "eligible voters" (clause 4(1)). Second, adoption of any proposed code requires approval by a majority of participants in the vote, provided those voting to approve total 25% plus one of eligible voters (clause 4(2)). The latter clause raises the question of whether it sets a sufficiently high threshold on matters of significant import to bands or whether, conversely, the threshold may be too high, given low voter participation in some bands. Both a council's proposal of any governance code and the ensuing vote are subject to regulations that may be made under clause 31.

b. Leadership selection (clauses 5 and 52)

Sections 74-80 of the *Indian Act* currently set out the framework for band council elections, with section 74 providing that bands are brought under that Act's electoral scheme by ministerial order. The *Indian Act* does not prescribe rules for "custom" leadership selection, which has served as the legislation's default leadership selection process since its inception.(36) Under federal policy, bands applying to "revert" to custom from the *Indian Act*'s scheme are typically required to operate under electoral regimes and, since 1988, under written codes.(37) As mentioned, more than half the bands that remain under the *Indian Act* are "custom" bands for leadership selection purposes, by election or otherwise;(38) the precise number not using elective systems is unknown.

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(36) The evolution of the *Indian Act*'s system of elective government is summarized in a 1991 paper prepared by Wendy Moss (Cornet) and Elaine Gardner O'Toole entitled *Aboriginal People: History of Discriminatory Laws*, BP-175E, Parliamentary Research Branch, Library of Parliament, under the heading "Self-Government".

(37) DIAND, *Conversion to Community Election System Policy*.

(38) Custom bands are not distinguished for other purposes under the *Indian Act*.

Clause 52 of Bill C-61 will repeal the *Indian Act*'s electoral provisions, while clause 5 prescribes rules that will apply to leadership selection codes adopted by both section 74 and custom bands.

i. Section 74 bands

Codes adopted by bands governed by section 74 of the *Indian Act* as of the coming into force of clause 5 "must" include a minimum of ten elements, of which the components are themselves prescribed in some cases (clause 5(1)). These elements include:

- the size and mode of selection of a band's council, of which the majority of members must be elected by secret ballot;
- the term of office of elected members, which must not exceed five years;
- "qualifications of persons who vote" and candidates;
- mechanisms for appealing election results and removing council members; and
- the procedure for amending the code.

In this area, the JMAC Report proposed that, while legislation should "clearly set out the basic standards of political accountability", it should ensure that those standards are "as unintrusive (non-prescriptive) as possible".[39] With a few exceptions, such as the absence of criteria defining voting qualifications,[40] the matters set out in clause 5(1) generally correspond to those recommended by JMAC for band-designed electoral processes. The FNGA leaves open the question of how a code's appeal mechanism might operate in practice. The matter of selecting a body to which voters might appeal election results could prove troublesome, particularly for small remote communities.[41]

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(39) JMAC Report, pp. D-18–19.

(40) Clause 5(1) does not stipulate that persons who are "eligible voters" in relation to code adoption procedures must also be entitled, under leadership selection codes, to vote in council elections.

(41) The question of appeals is touched upon under D.1.h, Observations related to governance codes.

ii. Custom bands

Leadership selection codes adopted by custom bands must either include the above minimum elements for section 74 bands or set out the band's existing custom rules, plus an appeal mechanism and amending formula (clause 5(2)). Custom leadership codes, unlike any other governance code provided for in Bill C-61, may only be adopted within two years of the coming into force of clause 5 (clause 5(3)).[42] This time restriction explicitly places custom bands under a more onerous requirement than will apply to non-custom bands and may be open to interpretation as designed to limit or reduce custom practices.

iii. Off-reserve band members

Under clause 5(5), non-custom leadership selection codes "must respect the rights of all members of the band but may balance their different interests, including the different interests of members residing on and off the reserve" (emphasis added). This provision appears to reflect references in the *Corbiere* decision to the balancing of rights of on- and off-reserve band members as a possible approach to devising an equitable electoral process for bands under the *Indian Act*'s election system. The provision does not extend explicitly to the bill's custom leadership selection codes, nor does the bill address off-reserve participation in leadership selection in the context of custom bands elsewhere.[43] The JMAC Report proposed that legislation related to leadership selection "[ensure] that all regimes include the right of all members of bands to appropriate participation and, in particular, are consistent with the Charter ...".[44]

iv. Choice of regime

The JMAC Report notes that "[t]he ability of bands to select their own ... regimes is likely an aboriginal right, a treaty right, or both. Imposing a regime on a band that prefers to select its leaders using some other regime would therefore be an infringement of those

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(42) See D.1.e, Governance codes vs. Regulatory default system.

(43) The *Corbiere* decision was not required to address the custom context either. The JMAC Report noted that related issues are before the courts, p. D-16.

(44) *Ibid.*, p. D-18.

[section 35] rights".[45] Under this interpretation, the single option open to section 74 bands may risk infringing their right to opt for a custom regime,[46] while the time restriction applicable exclusively to custom bands may *de facto* subject them to a regime not of their selection.

c. Administration of government (clause 6)

The *Indian Act* currently contains various provisions assigning powers to band councils, such as by-law-making authority, and stipulates that the exercise of band and band council powers requires the consent of a majority of electors and band councillors, respectively. It does not prescribe rules for the administration of band government *per se*, or address matters such as privacy, access to information or conflict of interest. For bands under the *Indian Act*'s electoral regime, procedural matters are addressed to some extent in the *Indian Band Council Procedure Regulations*,[47] which the JMAC Report viewed as "deficient, ... not well known or followed", and in need of complete revision.[48]

Clause 6 prescribes minimal procedural and other administrative standards for inclusion in any "administration of government" code adopted by any band.[49] These codes must set out rules relating to:

- band meetings, including their frequency, band members' participation and minutes (clause 6(1));
- band council meetings, including the holding of annual open meetings, the manner of making decisions and exercising council's powers, record keeping and access to records (clause 6(2));

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(45) *Ibid.*

(46) This is also the sole option open to newly established bands under clause 5(4)). It is worth noting that the term "established" does not necessarily mean new entities: see section 17 of the *Indian Act* on "New Bands". For example, when Newfoundland entered Confederation, in 1949, the bands in the region were not recognized under the *Indian Act*. In recent years, the government has been in discussions with the Innu of Labrador on the issue of recognition.

(47) C.R.C., c. 950.

(48) JMAC Report, p. F-9.

(49) Clause 2(3) provides that unless excepted, a council's powers under the FNGA are to comply with the band's administration of government code or the relevant default regulations. Clause 43(4) amends section 2(3) of the *Indian Act* accordingly and modernizes the provision relating to the exercise of band powers without altering its substance.

- the development, making and registration[50] of band laws, including public notice of proposed laws (clause 6(3));
- specified other topics, including band administration and its relationship to council, conflicts of interest of council members and band employees, access to information and privacy matters, and code-amending procedures (clause 6(4)).

Generally speaking, the matters targeted for inclusion correspond to those recommended in the JMAC Report.[51]

d. Financial management and accountability (clause 7)

Canadian governments typically operate within accountability guidelines found in legislation, regulations and policy. The *Indian Act* does not provide for financial accountability of band governments, for which accountability requirements are found either in their own codes, policies or by-laws or in federal policy, such as the current intervention policy authorized in funding agreements between bands and DIAND. The requirements of other federal departments providing funding to bands are inconsistent. Noting that "the capacities of bands, both organizational and financial, to implement enhanced accountability measures will need to be assessed and considered",[52] the JMAC Report concluded that it seemed "reasonable that legislation could provide the basis for establishing consistent and comprehensive band financial management and accountability regimes".[53]

Like clauses 5 and 6 in areas of leadership selection and government administration, clause 7 sets out minimum standards for any "financial management and accountability" code adopted by any band. They include rules for preparation and adoption of an annual budget; controlled expenditure of and signing authority for band funds; internal controls for deposits and asset management; various loan-related matters; salaries of council members

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(50) See discussion on clause 30 concerning band and national registries.

(51) JMAC Report, pp. F-25–26. JMAC cautioned that conflict of interest rules risk being overly complex and technical, leading to inadvertent breaches, and recommended that such rules relate only to financial matters, with optional inclusion in administration of government codes of conflict of interest rules for band employees: p. F-20 and F-26.

(52) *Ibid.*, p. E-2.

(53) *Ibid.*, p. E-11.

and band employees; debt and debt management as well as deficit management; and procedures for amending the code.

These standards generally reflect those considered suitable for bands' financial codes by the JMAC Report.(54)

e. Governance codes vs. Regulatory default system (clauses 4(3), 32, 36, 59)

Provisions at clauses 4 through 7 relating to "band-designed" governance codes do not stipulate a time frame for their adoption. The transitional provision in clause 36 addresses this matter, stating that regulations under clause 32 are to apply to bands without their own codes two years after the code adoption provision in clause 4 comes into force.(55) Clause 32(1) authorizes the Governor in Council to make regulations in all areas in which band-designed codes may be proposed under clause 4, with the exception of custom leadership selection codes.

Accordingly, a band will fall subject to the default regime(s) authorized by clause 32(1), should its governance code(s) not be created, proposed and approved within the two-year window provided by clause 36.(56) Except in the case of custom leadership selection codes discussed above in clause 5(3), "default" bands will not be precluded from adopting their own governance code(s) at a later date.(57)

The protracted nature of the legislative process at any level of government may raise concerns about whether the bill's time frame for the development and ratification of complex governance codes by bands with widely varying circumstances will prove adequate, or whether many bands might find themselves governed by one or more default systems, at least initially, owing to insufficient time and tools.

Bill C-61's graduated coming into force regime may be relevant to the timing issue for at least some bands. It provides that clauses 4 through 7 (governance codes) and 36 (two-year window) come into force by Order in Council (clause 59), while clause 32

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(54) *Ibid.*, p. E-14.

(55) Under clause 36, a band's eligible voters may adopt clause 32 regulations within the two-year window.

(56) During this transition period, the *Indian Act*'s electoral provisions will remain in effect.

(57) While a band code is in force, regulations under clause 32 on the same subject matter will be inapplicable to that band (clause 4(3)).

(authorizing default regulations) takes effect on Royal Assent.[58] Although the bill does not provide for such a process, DIAND documentation indicates that it will consult with bands on default regulations, and apparently intends that governance code provisions will come into force upon their passage.[59] Accordingly, a gap is expected between adoption of the bill and the passage of default regulations and coming into force of governance provisions. In practice, then, it would appear that:

- bands may wait for default regulations and the coming into effect of clauses 4 through 7 before deciding which system they wish to adopt, in which case development of codes would take place within the two-year transition period;
- bands may decide prior to the coming into effect of the default regulations and clauses 4 through 7 that they wish to design one or more of their own governance regimes and may begin to do so, in which case they would enjoy more than a two-year window from the adoption of the bill during which to develop the code(s);
- since Bill C-61 does not set a specific time frame for their coming into force by order, it is possible that clauses 4 through 7 could take effect some time after the passage of default regulations, in which case the transition period would also be greater than two years in practice for all bands.

f. Ministerial role in appeals (clause 32(2))

In addition to the general authority set out in clause 32(1), clause 32(2) states a specific requirement that regulations creating an appeal process related to elective band council positions "must provide that an appeal be heard by the Minister". This stipulation, which ensures continued ministerial involvement in leadership selection matters for bands without their own codes, seems at odds with one of the stated objectives of the FNGA, to diminish the Minister's role in band affairs.

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(58) As does clause 31 authorizing regulations for the adoption of codes under clause 4.

(59) DIAND, "Communities First: First Nations Governance", *Coming into Force*, on-line at http://www.fng-gpn.gc.ca/FNGA_FI_ev_e.asp.

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g. Exemptions (clause 34)

Under the FNGA, the Governor in Council may, within two years of the coming into force of clause 4 relating to code adoption, order that a band be exempt from the bill's application, in whole or in part, for a prescribed period. Such an order would excuse bands from both code adoption requirements and the application of default governance systems, and may be issued only to facilitate completion of pending self-government agreements (clause 34). Depending on when clause 4 takes effect, this mechanism might be brought to bear, for example, in the case of self-government processes currently nearing completion in the Yukon or that may accelerate under the British Columbia treaty process.

h. Observations

The proposed FNGA regime will effect considerable reforms for over 600 bands and band governments. The JMAC Report commented on the issue of bands' present capacity to develop new governance systems, expressing the view that

> [b]ands should be the primary entity to assume [functions currently exercised by government]. Some bands may not now have the capacity ... [T]here is the need for an institution, particularly during an interim period. In addition, because of the size of some bands, some may not be able to assume all the roles, and therefore there is also a need for an institution to provide governance services to bands on a permanent basis.[60]

JMAC cautioned that "[i]f there is not an institutional capacity component to this initiative, bands will be forced to privately retain lawyers, accountants, financial officers, and other consultants at considerable expense".[61] It suggested that an "independent Institution" created legislatively could fill many functions, including assisting to establish and implement governance practices and draft codes upon request, designing and providing training programs, handling election appeals, undertaking responsibilities related to financial accountability, and so forth.[62]

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(60) JMAC Report, p. G-3.

(61) *Ibid.*, p. G-4.

(62) *Ibid.*, pp. G-6–10.

On 17 June 2002, during first-reading debate on Bill C-61 in the House of Commons, the Minister touched briefly on the institutional issue, indicating that the bill will "pave the way to create an advisory body to support first nations as they take on added roles to build better communities. The advisory body could assist with developing codes for governance, leadership selection and financial management, as well as providing a process for complaints and appeals".(63) Since Bill C-61 does not provide explicitly for any institution of the sort advocated by the JMAC Report, it remains unclear at this time how and when such a body is to be established. The broad authority conferred on the Governor in Council to make regulations to carry out the FNGA's purposes (clause 33) may provide one avenue; another is the Order in Council mechanism. The JMAC Report pointed out(64) that the latter option would enable only advisory functions, and would not allow the advisory body to handle election appeals.(65)

The FNGA does not create a "compliance" mechanism to determine if band-designed governance regimes meet the legislation's requirements. On this matter, the JMAC Report concluded by consensus that "such a requirement is unnecessarily intrusive and costly" and would amount to "nothing more than a continuation of the Minister's power of disallowance" of band by-laws under the *Indian Act*. The Report further noted that band-designed regimes were open to court challenge whether or not a verification procedure existed.(66)

2. Financial Management (clauses 8-10, clause 59)

Clauses 8 through 10 prescribe additional financial management measures with further implications for bands' implementation capacities.(67) Unlike provisions related to the

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(63) House of Commons. Hansard. *Debates*, 17 June 2002, on-line at http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/207_2002-06-17/HAN207-E.htm#PT-2

(64) JMAC Report, p. G-11.

(65) On 19 June 2002, responding to a question concerning the funding of FNGA processes, the Minister suggested that a preliminary assessment placed costs at $110 million, with increases in band support of 5% annually to 2006 "for First Nation governments to have the capacity and the quality of public servants necessary to develop ... these new institutions and the new codes": DIAND, "Transcription: Conference Call re: New First Nations Governance Act", Ottawa, 19 June 2002, on-line at http://www.ainc-inac.gc.ca/nr/tran/abm_e.html. No official announcement concerning funding for FNGA purposes or criteria for its allocation has been made to date.

(66) JMAC Report, pp. B-18–19.

(67) The JMAC Report noted that many bands lack capacity to deal with this complex area of administration. It indicated that certified Aboriginal Financial Officers of the relatively recent Aboriginal Financial Officers Association are making inroads in addressing this matter.

development and adoption of accountability and other governance codes, these measures are – with exception of clauses 10(1) and (2) – to take effect on Royal Assent (clause 59).

a. Financial statements (clauses 8 and 9)

Under the FNGA, bands must maintain their accounts and prepare annual financial statements following accounting principles of the Canadian Institute of Chartered Accountants (clause 8). The bill also requires that bands' financial statements be audited under that Institute's standards by an independent auditor (clause 9(1)), and that they include the salaries and expenses of council members (clause 9(2)).

Bill C-61 makes provision for enhanced access to bands' financial statements, stipulating that a band must make its financial statements "publicly available" within a prescribed period, and provide a copy to "any person" paying a fee (clause 9(3)). The issue of disclosure of bands' audited financial statements has been controversial. Currently, no legislated requirements apply. Government policy specifies that bands must submit annual consolidated audits to DIAND for evaluation of their overall financial status, and make them available to their members.[68] Although audits submitted to government are generally subject to the *Access to Information Act*, a band may refuse access to non-band members where the requested audit contains confidential information concerning the band's private commercial transactions, financial holdings or own-source revenues.[69]

Clause 9(3) does not define the scope of the statements that must be made public, neither stipulating that they must be consolidated, nor that they need detail only public revenues. JMAC members differed as to how financial management provisions in eventual legislation might deal with this issue.[70] The Report observed, on the one hand, that information concerning a band's commercial transactions and revenues unrelated to government transfer payments was vital for band members but arguably "no affair of the general public".[71] On the other hand, other levels of government and the many bands that do make consolidated audits widely

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(68) DIAND also provides these audits to members claiming denial of access.

(69) This was confirmed in the 1988 decision of the Federal Court of Canada in *Montana Band of Indians* v. *Canada* (*Minister of Indian Affairs and Northern Development*), [1989] 1 F.C. 143 (T.D.) and in subsequent complaints to the Information Commissioner.

(70) JMAC Report, p. E-24.

(71) *Ibid.*, p. E-12.

available do not appear penalized by publication of commercial information. Given that band members are already entitled to full disclosure, "it may be a small step to require full public disclosure".[72]

b. Financial breach (clause 10)

Any "significant breach" of a rule related to debt or deficit in a band-designed accountability code or default regulation triggers a requirement that the band council assess the band's position and develop a recovery plan for the financial management of "band funds", to be presented to band members within a prescribed period (clause 10(1)). Quarterly reports on the plan must be made until the breach is remedied (clause 10(2)).[73]

The bill does not define "significant breach". Under current DIAND policy, a deficit of 8% of a band's operating budget results in review of its financial circumstances, with the first stage of intervention involving a band-designed and -administered remedial plan under DIAND supervision. The scheme set out in clauses 10(1) and (2) appears to combine elements of the existing policy approach and of a JMAC option aimed at ensuring bands a high degree of independence in dealing with their financial situation. In this regard, while DIAND interventions deal exclusively with moneys transferred under funding agreements, "band funds" referred to in clause 10, as defined in clause 2, appear to include non-governmental sources of band revenue.

c. Ministerial involvement (clause 11)

The FNGA also authorizes discretionary ministerial interventions in bands' financial affairs. Under clause 10(3), the Minister "may" assess a band's "financial position" and, if he or she considers it necessary, require "remedial measures" when any of three circumstances "becomes known": deteriorated financial health compromising delivery of "essential" programs; failure to make financial statements public within the prescribed period; and an adverse opinion by the band's auditor.

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(72) *Ibid.*, pp. E-16–17.

(73) Under the FNGA's transitional clauses, bands that have exceeded their accountability code's deficit limit as of the taking effect of clause 10 are subject to that provision (clause 40(1)).

Clause 10(3) contains elements of another alternative outlined in the JMAC Report relating to interventions for bands in financial difficulty.(74) The Report noted that this option "maintains a significant role for the Minister in the financial accountability regime of bands and therefore runs contrary to one of the main objectives of this legislation project".(75) JMAC suggested that it would be preferable to assign the intervention role to an independent First Nations institution: eventual legislation could "provide for a transition and a linkage by designating the Minister as the institution until such time as a First Nations institution comes into being with the capacity to perform this function",(76) perhaps under anticipated fiscal institutions legislation.

Under present DIAND policy, interventions in a band's affairs may follow political or social turmoil as well as financial difficulties. Clause 10(3) appears to restrict the Minister's statutory capacity to intervene to financially driven circumstances, but does not preclude continued interventions under funding agreements in other contexts. The provision does not define the sort of remedial measures the Minister might undertake, set a time limit for ministerial interventions,(77) nor define the scope of the "financial position" in clause 10 that the Minister is authorized to assess. The JMAC Report underscored that "whatever intervention method is selected, it should ensure that the intervener has the same capacity as the band administration to deal with the full financial picture of a band including trust accounts, commercial ventures, other own source revenues, as well as inter-governmental transfers".(78)

d. Observations

Bill C-61 does not provide for an external auditor general. The JMAC Report considered that such a body would be premature at this early stage of the development of bands' governance structures, and that the Report's proposals provided a comprehensive accountability package. JMAC expected that bands would function satisfactorily with capacity development

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(74) JMAC Report, p. E-19.

(75) *Ibid.*, p. E-20.

(76) *Ibid.*

(77) Bill C-61 provides that the Minister may continue remedial measures for a band under such measures on the coming into force of section 10, or order a recovery plan for that band (clause 40(2)).

(78) JMAC Report, p. E-19.

help through a First Nations institution, but might wish to establish such an external body to provide independent assessment of their performance at some future date.[79]

The legislation makes no mention of "results-based" accountability. The JMAC Report considered this option, concluding that performance measures for Canadian public institutions remain largely policy-dictated, and that "legislation is not the appropriate vehicle to ensure that program outcomes are achieved".[80]

3. Complaints and Redress (clauses 11, 33, 39, 41-42)

a. Band process (clauses 11, 33, 39)

Apart from election appeals to the government,[81] the *Indian Act* does not currently provide a mechanism for treatment of band members' grievances related to band administration. Under Bill C-61, a band council must, within two years of Royal Assent (clause 39), put in place a law authorizing either an impartial person or an impartial body[82] to consider complaints by band members or non-member reserve residents and to undertake remedial measures (clauses 11(1)-(2)). This represents the only mandatory exercise of band council law-making authority under the FNGA. The redress mechanism will apply to complaints alleging a breach of a governance code – a broad category – or contesting a discretionary decision "against" a member or resident by a council or band employee. Any person or body in a conflict of interest position in relation to a complaint may not consider it (clause 11(4)), while a decision from which an appeal may be taken under a governance code may not be contested using the bill's redress mechanism (clause 11(5)).

On the topic of redress, the JMAC Report suggested that members would benefit from the creation of an internal process, which could be supplemented by an Ombudsman function carried out by JMAC's recommended "independent Institution".[83] A redress role was among those mentioned for the possible advisory body during the Minister's first-reading address.

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(79) *Ibid.*, p. E-22.

(80) *Ibid.*, pp. E-21–22, E-27.

(81) The process set out in the *Indian Band Election Regulations*, C.R.C., c. 952, s. 12-13, applies only to bands under the *Indian Act*'s election regime.

(82) See discussion of clause 18 under E.2.b, Governance laws.

(83) JMAC Report, pp. G-5, G-8–9

b. External process (clauses 41-42)

Bill C-61 opens a broader redress avenue under the *Canadian Human Rights Act*[84] (CHRA). Section 67 of that statute has stipulated since 1976 that "[n]othing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act". The controversial exemption has not entirely prevented band members from gaining access to CHRA mechanisms, as the courts have generally interpreted that the human rights legislation remains applicable to band council activities or policies that are not based on the *Indian Act* or regulations under it.

In 2000, the report of the federally appointed Review Panel on its comprehensive review of the CHRA recommended that the section 67 exemption be removed, and that an interpretive provision be incorporated in the CHRA "to ensure that Aboriginal community needs and aspirations are taken into account in interpreting the rights and defences in the [CHRA] in cases involving employment and services provided by Aboriginal governmental organizations. Such a provision would ensure an appropriate balance between individual rights and ... community interests".[85]

Clause 42 of the FNGA proposes to repeal section 67 of the CHRA, thus making its redress mechanisms available to band members in relation to federal and band government actions under both the *Indian Act* and Bill C-61. Clause 41 adds an interpretive provision along the lines recommended by the Review Panel under which the needs and aspirations of the Aboriginal community affected by a complaint against an "aboriginal governmental organization" must be taken into account in interpreting and applying the CHRA, "to the extent consistent with principles of gender equality".

The bill does not define "aboriginal governmental organization" or "principles of gender equality". The concept of gender equality does not appear in other federal statutes consulted.[86] Its inclusion in clause 41 appears to represent the sort of balancing exercise

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(84) R.S.C. 1985, c. H-6.

(85) Canadian Human Rights Review Panel, *Promoting Equality: A New Vision*, June 2000, Ottawa, p. 132.

(86) DIAND policy requires that gender equality analysis to assess the "differential impact on women and men of proposed and existing policies, programs and legislation" be integrated in the development and implementation of legislation: *Gender Equality Analysis Policy*, on-line at http://www.ainc-inac.gc.ca/pr/pub/eql/eql_e.pdf.

contemplated by the Review Panel, with specific reference to gender alone perhaps reflecting recognition of the potential prevalence of gender-related issues that could be raised under the CHRA following removal of the section 67 exemption. Under clause 41, a woman complainant's rights under the CHRA may be trumped by community interests only to the degree consistent with gender equality principles.

The JMAC Report agreed removal of section 67 should be linked to insertion of an interpretive provision to ensure "aboriginal and treaty rights [are considered] in interpreting and applying the *CHRA* to bands and band councils". It ultimately concluded, however, that repeal should occur "only in the context of the federal government's comprehensive response to the Review Panel's recommendations", which has not yet taken place. JMAC also expressed concern that elimination of the exemption would result in increased workload for the Canadian Human Rights Tribunal and increased training and resource needs of bands in order to implement the CHRA and defend against complaints. In JMAC's view, "[c]onsideration will need to be given to whether band councils will face complaints when they are implementing federal programs", as well as to the relationship between the CHRA and status and membership issues under the *Indian Act*.[87]

4. Band Government Operations (clauses 12-14)

The FNGA provides that band councils must make policies and rules related to government operations available to members and reserve residents, including programs and services offered to them (clause 12). It is not clear to what degree this requirement could represent an additional burden for band administrators, particularly those from small bands. In addition, assuming the provision extends to federal operations, programs and services, the federal government may arguably be in a better position, from both resource and knowledge perspectives, to provide information about them.

The *Indian Act* does not currently protect band councils or employees from civil proceedings related to work or office-related activity. Bill C-61 provides that the liability of council members and band employees will be limited with respect to anything done during the exercise in good faith of any power or duty under the *Indian Act*, the bill, regulations made under

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(87) JMAC Report, p. B-12.

either, any governance code or law under the FNGA or any by-law under the *Indian Act* (clause 14).

E. Provisions Related to the Powers of Band Councils

1. Legal Capacity (clause 15)

Although the *Indian Act* defines bands and band councils and confers authority on both, it has not, to date, explicitly recognized either as legal persons. Bands under the *Indian Act* are considered unique legal entities with somewhat ambiguous status under Canadian law, legal persons for specific purposes under specific statutes but not others.[88] The JMAC Report concluded that "certain advantages would accrue to bands if their legal status was clarified".[89]

Bill C-61 proposes that any band under the *Indian Act* would have "the legal capacity, rights, powers and privileges of a natural person", including the right to contract, engage in property transactions and legal proceedings, and do anything ancillary to its capacity (clause 15(1)), and that a band's capacity be exercised through its council (clause 15(2)). The clause 15(1) definition echoes the general substance of those set out for specific bands under various federal statutes establishing self-government or other regimes,[90] and generally corresponds to one of the options contained in the JMAC Report.[91]

The JMAC Report acknowledged an enduring view that equating bands with legal persons makes them akin to corporate bodies and represents a fundamental change in their status.[92] It recommended that any changes in this area "must be accompanied by provisions that ensure that [they] do not diminish [bands'] unique nature under Canadian law. Bands must not be transformed into corporations". Similarly, concerns over potentially increased vulnerability of reserve lands and band moneys led JMAC to conclude it was essential that these interests not be affected by any amendments related to bands' legal capacity. The FNGA generally reflects both areas of concern. Although not explicitly acknowledging the unique nature of bands' legal

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(88) While some courts have held that a band has the capacity to sue, be sued and to enter into contracts, others have ruled that a band is not a "person," has no corporate status, and may not own real estate.

(89) JMAC Report, p. C-13.

(90) *Cree-Naskapi (of Quebec) Act*, *Sechelt Indian Band Self-Government Act*, *Yukon First Nations Self-Government Act*, *Kanesatake Interim Land Base Governance Act*, *First Nations Land Management Act*.

(91) JMAC Report, p. C-18.

(92) In this light, one alternative considered by JMAC on which no consensus was reached would have made any new provisions for enhanced legal capacity optional, *ibid.*, pp. C-20–23.

status, the bill does provide, for greater certainty, that the definition in clause 15(1) neither affects that status nor has an incorporating effect (clause 15(3)), nor does it affect band members' interests in reserve lands and band moneys under the *Indian Act* (clause 15(4)).

In relation to a further concern related to the fiduciary relationship between the Crown and bands, the JMAC Report noted that defining bands' legal capacity "will not affect the general fiduciary relationship between the Crown and First Nations" *per se*, but that other amendments giving bands greater authority over their interests could alter specific fiduciary duties.[93] Finally, JMAC noted the need to reconcile the Bill C-61 definition of legal capacity with those in other acts, none of which is amended by the bill.

2. Law-making Powers (clauses 16-18, 33, 37, 51, 53-55, 59)

Under the *Indian Act*, a band council's by-law-making powers in relation to reserves may at present be considered analogous in some respects to those of municipalities under provincial legislation, with the council's authority confined to matters delegated and defined by the *Indian Act*. These limitations have long been criticized by bands and representative organizations as out of keeping with traditional law-making practices. Currently, the *Indian Act* provides for band by-laws as follows:

- Subsection 81(1) lists 22 areas in which a council may make by-laws related to local matters such as allotment of and residence on reserve land, zoning, traffic control, trespassing and other law and order matters, wildlife protection and husbandry. Section 81 by-laws may not be inconsistent with the *Indian Act* or regulations under it. In this regard, subsection 73(1) gives the Governor in Council rarely exercised regulatory power over many closely related, if not overlapping, matters. All section 81 by-laws are subject to the Minister's power of disallowance (section 82);

- Section 83 authorizes councils to make several categories of "money" by-laws, subject to the Minister's approval and to the Governor in Council's regulatory authority over the exercise of the by-law-making power;

- Under section 85.1, a band council may make by-laws governing the use of intoxicants on a reserve, subject to the approval of a majority of voting electors, and provided the Minister is furnished with copies forthwith.

The JMAC Report noted that many section 81 powers "seem anachronistic and [do] not address a host of issues" such as landlord-tenant and environmental issues where band

(93) *Ibid.*, p. C-15. JMAC underscored the distinction between the fiduciary relationship and fiduciary obligations, noting that if the Minister of the Cabinet no longer has authority over a given subject matter, the fiduciary duty in that area will cease as well, pp. B-4–5, n.

councils' authority might be enhanced.[94] JMAC members supported the elimination of ministerial authority in relation to band by-laws.[95]

a. General laws (clauses 16 and 17)

Bill C-61 essentially retains most of the substance of by-law subject-matters currently set out in sections 81, 83 and 85.1 of the *Indian Act*, modernizing their language and consolidating them under two new headings: band councils may make "laws" "for local purposes, applicable on the band's reserve" (clause 16(1)), and "for band purposes" (clause 17(1)) (emphasis added). This differentiation appears to reflect the distinction, arising from the *Corbiere* decision, between subject matters of primary interest to band members on reserve, and those affecting both on- and off-reserve members. The bill makes no provision for ministerial authority related to councils' law-making processes.

Clauses 16(1) and 17(1) alter councils' law-making scope with the addition of authority:

- for local purposes, over prevention of damage to property (16(1)(*b*)), provision of services by the band (*d*) and residential tenancies (*i*);[96]
- for band purposes, over the protection, conservation and disposition of some natural resources "within the band's reserve" (17(1)(*a*)) and preservation of a band's language and culture (*c*).

Bill C-61 will repeal most of the *Indian Act*'s by-law provisions (clauses 53 and 55), including those defining "money" by-law powers. Some of the latter will, however, remain in effect, along with the related requirement for ministerial approval (clause 54).[97] The bill will also rescind subsection 73(1) of the *Indian Act* (clause 51), but not the Governor in Council's

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(94) *Ibid.*, pp. F-13–14.

(95) *Ibid.*, p. F-12.

(96) Bill C-61 does not make provision for councils to enact laws on local environmental matters, as suggested by JMAC, perhaps reflecting the complexity of jurisdictional issues in the area.

(97) Money by-laws retained in section 83 of the *Indian Act* include those related to taxation for local purposes; enforcement of payments; recovery of interest; and raising moneys from band members for projects. Note that the *Indian Act*'s remaining provisions pertaining to money by-laws (sections 83 and 84) would be repealed by the First Nations Fiscal and Statistical Management Act, draft legislation released for consultation purposes on 15 August 2002 and described as the "third plank" of a plan designed to improve bands' self-sufficiency, the other two being the FNGA and the *First Nations Land Management Act*.

broad authority under subsection 73(3) of the *Indian Act* to make regulations "to carry out the purposes and provisions of this Act". As previously mentioned, Bill C-61 authorizes analogous regulation-making power, stipulating that it may not be exercised with respect to matters in which councils may make laws under clauses 16 and 17 (clause 33).

Clauses 16 and 17, as well as those provisions repealing sections of the *Indian Act* related to by-laws, are to take effect by Order of the Governor in Council.(98) Clause 33 authorizing regulations to implement the bill takes effect on Royal Assent (clause 59).

b. Governance laws (clause 18)

In addition to re-working and adding to councils' existing by-law-making jurisdiction, the FNGA defines new law-making powers related to governance matters that generally appear to correspond to the JMAC Report's recommendations for additional council authority in this area.(99) Clause 18(1)(*a*), for instance, authorizes a band council to make laws related to the establishment, composition and powers of "bodies", and their relationship to the band.(100) Such a body might, for example, be established to implement the redress mechanism mandated by clause 11 for the purpose of dealing with band members' complaints. The majority of the remaining discretionary authorities set out in clause 18(1) relate to topics that are required to be included in governance codes,(101) including elections of council members (*c*), conflicts of interest (*d*) and access to information and privacy (*e*).(102)

Of particular note, clause 18(1)(*b*) also enables a band council to make laws for the delegation "to any person or body ... of any of the council's powers" under the bill or the *Indian Act*, with the exception of those set out in clause 18. This broadly drafted provision

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(98) Under transitional clause 37, a band's by-laws that are in effect when the *Indian Act*'s general by-law provision is repealed and that do not conflict with the FNGA or the band's governance code(s) will be deemed band laws under the FNGA, which must be deposited in the registries required by clause 30 within the prescribed period. Registry provisions are discussed under E.4.

(99) JMAC Report, p. F-26.

(100) The JMAC Report referred to "band council committees", *ibid.*

(101) Bill C-61 does not stipulate that laws in these areas must be consistent with provisions on corresponding subject-matters in the relevant governance codes, nor provide for potential conflict situations. The JMAC Report's discussions assume that any laws dealing with code subjects could not be inconsistent with the latters' provisions: *ibid.*, pp. F-19–20.

(102) The conditions for entering into commercial transactions may also be the subject of laws under clause 18(1).

extends, for example, to council powers set out in the bill to propose codes under clause 4 and to make laws under clauses 11, 16 and 17, as well as to remaining by-law authority, allotment of reserve land and other council powers under the *Indian Act*. Bill C-61 further authorizes councils of two or more bands to make laws for "joint establishment" of such a delegated body and outlining its composition and powers and relationship to the bands involved (clause 18(2)). It does not define the legal capacity of any delegate entity created either by a single band or jointly, or require that relevant band laws outline procedural measures specific to its creation, such as the prior approval of band electors.(103)

Clauses 18(1)(*b*) and 18(2) confer extensive delegation authority. Government documentation suggests that the combined authority "will be particularly useful in small communities where capacity limitations might otherwise impede implementation of the FNGA".(104) On this issue, the JMAC Report noted that the *Indian Act* makes no provision for any delegation of council jurisdiction and recommended that councils be authorized to delegate "some powers to health boards, tribal councils or entities under the [*Indian Act*], provided that law-making powers can only be delegated to another elected body".(105) The bill does not set conditions related to delegation, and may expand on the scope of delegated authority contemplated by JMAC.

3. Conflict of Laws (clauses 16(2),17(2), 18(2))

To date, ministerial authority in by-law matters under the *Indian Act* has precluded the need for provisions dealing with conflicts between band by-laws and the *Indian Act* or other federal statutory instruments. In light of reduced ministerial involvement in this area, Bill C-61 specifies that in the event of conflict between a council law and any federal statute or regulation, the federal instrument will prevail. Accordingly, a band law would not prevail over, for example, conflicting regulations under the *Fisheries Act*.

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(103) Notice requirements in government administration codes and, presumably, in the eventual analogous default system, would apply.

(104) DIAND, "Communities First: First Nations Governance", *Law-making*, on-line at http://www.fng-gpn.gc.ca/FNGA_FI_pl_e.asp.

(105) JMAC Report, p. F-11.

4. Registries (clause 30)

Under the FNGA, a band will be required to maintain a registry containing any codes and all laws made by its council under the bill,[106] to provide "all persons" reasonable access to it (clause 30(1)), and to furnish copies to anyone requesting any law or code (clauses 30(5)). The bill provides that, unless otherwise specified, a band's code(s) and laws take effect the day following their deposit in the band registry (clause 30(4)). The Minister must also establish a national registry of all band codes and laws made under the bill and enable access to it (clause 30(2)).

The JMAC Report favoured a band registry scheme for band laws,[107] as well as "a formal mechanism" [108] such as local or national registration to evidence the adoption of band-designed codes. JMAC does not appear to have addressed the option of a parallel national registry of either laws or codes. The rationale for the dual requirement relates, according to government documentation, to ensuring "overall transparency and access ... locally and nationally".[109]

5. Offences (clauses 19-29)

Sections 101 through 107 of the *Indian Act* provide for offences under it and related punishments; peace officer enforcement of a band's intoxicant by-laws and a few other provisions in the legislation, including seizure and detention of goods; disposition of fines to the Crown for the benefit of the band or its members; and appointment of justices of the peace with authority over offences under the *Indian Act*. The JMAC Report observed that problems associated with enforcement of by-laws under that Act include the absence of a ticketing scheme, and the lack of sufficient enforcement officers and prosecutors.[110]

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(106) Clause 6(3) provides that a government administration code must contain rules for the maintenance of such a registry.

(107) JMAC Report, p. F-25.

(108) *Ibid.*, p. B-18.

(109) DIAND, "Communities First: First Nations Governance", *Registration and Proof of Band-Designed Codes and Laws*, on-line at http://www.fng-gpn.gc.ca/FNGA_F1_ra_e.asp

(110) JMAC Report, p. F-5. The *Indian Act* does not make explicit provision for the appointment of by-law enforcement officers. Although some bands do create "enforcement" positions, for example under their by-law authority over the observance of law and order (par. 81(1)(c)), they have limited duties and no true enforcement capacity.

Bill C-61 proposes to fill certain gaps in and expand bands' existing enforcement capabilities, while leaving the *Indian Act*'s existing provisions undisturbed.[111] Of particular note, the bill will:

- authorize band laws to impose fines of up to $10,000 and/or imprisonment of up to three months[112] on anyone convicted of contravening their provisions[113] (clause 19(1));
- authorize band councils to designate band enforcement officers to enforce band laws (clause 23(1));
- provide for a ticketing scheme to be implemented by peace officers or designated band enforcement officers (clause 21),[114] and for the payment of resulting fines and transfer of forfeited property to the band council (clause 22(1));
- authorize a band enforcement officer to verify compliance with band laws by means of broad authority to carry out "any inspection" considered necessary in "any place" on the reserve, including requiring the production of documents and using and reproducing other data sources (clause 24(1)-(2));
- require that anyone in the place under inspection assist the officer to enable the inspection, and provide any information "relevant to the administration of a band law" required by her/him (clause 25);
- authorize a band enforcement officer to whom a warrant has been issued to search "any place" on the reserve if she/he believes on reasonable grounds that anything relating to present or past offences against a band law may be there, and to seize any such thing found (clause 26).[115]

The bill contemplates a clear distinction between clause 24 inspections for purposes of verifying compliance with band laws and clause 26 searches related to the suspected

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(111) Clause 58 will amend subsection 103(1) of the *Indian Act* to remove mention of enforceable provisions identified in it that are repealed by the bill.

(112) In the case of a law intended to prevent environmental degradation, the maximum fine and term of imprisonment that may be set are $300,000 and six months, respectively.

(113) Section 102 of the *Indian Act* currently provides that, in the absence of other penalties, the maximum fine for contravening the Act or its regulations is $200. Note that section 30 imposes a maximum $50 fine and one-month term of imprisonment upon conviction for trespassing on a reserve. Bill C-61 does not repeal section 30, with the result that the punishment for trespass under the *Indian Act* is maintained, while a band law related to trespass made under clause 17(1)(*d*) of Bill C-61 may impose a fine 200% higher.

(114) Under clause 21(4), a band may make an agreement with a competent provincial authority as to which ticket or process will be used under the ticketing scheme, thus determining procedures applicable to it.

(115) Clause 26 powers may be exercised without a warrant only in "exigent circumstances". A warrantless search of living quarters requires the occupant's consent (clause 27).

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commission of offences against them. However, both provisions involve intrusive measures and may be subject to challenge under section 8 of the Charter, which guarantees the right to be secure against "unreasonable search and seizure". Further, while clause 26 requires that there be "reasonable grounds" to issue a warrant for the exercise of search/seizure authority, clause 24 sets no pre-conditions for the exercise of inspection powers and may be more open to charges of "unreasonable" implementation. The JMAC Report's observation that band enforcement officers "would need to receive adequate training on the proper exercise" of search and seizure powers seems equally applicable to Bill C-61's powers of inspection.

Bill C-61's ticketing scheme and increased fines are consistent with specific recommendations of the JMAC Report.(116) The Report noted that resolving serious issues related to the enforcement of what will now be band laws involves providing more funding, including to train enforcement officers, and requires discussion with other federal departments.

F. Unaffected Parts of the *Indian Act*

Most of the *Indian Act* remains intact. The bulk of significant amendments to it proposed by Bill C-61 and discussed under previous headings relate primarily to electoral provisions, band by-laws and regulatory authority,(117) while a few others repeal a handful of provisions long considered to be particularly archaic.(118)

Parts of the *Indian Act* not already discussed that remain substantively unaffected by the FNGA include:

- Definitions (sections 2(1)-(2))
- Administration (section 3)
- Application (sections 4-4.1)
- Definition and Registration of Indians (sections 5-17)

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(116) In 1996, Bill C-79 contained similar provisions, with less substantial fine increases. The bill does not address the JMAC Report's further recommendation related to lack of clarity with regard to prosecutions of band laws. According to JMAC, provincial and/or federal prosecutors may refuse to prosecute band by-laws on the ground that they are not within their respective areas of responsibility.

(117) Amendments making related consequential changes to the *Indian Act* or minor textual modifications have not been reviewed.

(118) Proposed repeals of section 32-34, 71, 92-93 (clauses 46, 50, 57) duplicate proposals made in 1996 in Bill C-79.

- Reserves (sections 18-19), Possession of Lands in Reserves (sections 10-29), Trespass (sections 30-31)
- Lands Taken for Public Purposes (section 35)
- Special Reserves (section 36)
- Surrenders and Designation (sections 37-41)
- Descent of Property (sections 42-44), Wills (sections 45-46), Appeals (section 47) Distribution of Property on Intestacy (sections 48-50)
- Mentally Incompetent Indians (section 51), Guardianship (section 52)
- Money of Infant Children (sections 52.1-52.5)
- Management of Reserves and Surrendered and Designated Lands (sections 53-60)
- Management of Indian Moneys (sections 61-69)
- Loans to Indians (section 70)[119]
- Treaty Money (section 72)
- Taxation (section 87)
- Legal Rights (sections 88-90)[120]
- Trading with Indians (section 91)
- Schools (sections 114-122)

G. Principal JMAC Report Recommendations Not Included in Bill C-61

With reference to the legislative approach proposed in the JMAC Report,[121] it would appear that significant recommendations not pursued or contained in Bill C-61 relate to:

- Making legislative changes by way of amendments to the *Indian Act* rather than in a stand-alone statute

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(119) Bill C-79 proposed to repeal this section.

(120) Section 88 makes provincial laws of general application applicable to Indians, provided they are consistent with the *Indian Act* and its subordinate statutory instruments and do not make provision for anything in or under that Act. Clause 56 incorporates the FNGA and regulations and laws under it into section 88.

(121) See p. 8.

- Creation of an independent Institution to assist bands with governance-related and other administrative activities
- Inclusion of a non-derogation clause to ensure that nothing in the legislation is construed so as to infringe on existing Aboriginal or treaty rights
- Making the legislation binding on the Crown, as is the case in settlement legislation related to land claim agreements and other recent legislation such as the *First Nations Land Management Act*.

COMMENTARY

Divergences in governmental and First Nations' perspectives on the First Nations Governance Initiative emerged during the pre-legislative period beginning in April 2001. As a growing body of documentation attests, they continue to differ sharply as to the objectives, merits and effects of Bill C-61.

From the government's viewpoint, the legislation reflects commitments to strengthen First Nations governance made in the January 2001 Speech from the Throne, and is essential to address an unacceptable situation affecting First Nations communities arising largely from a deficient *Indian Act* regime. Bill C-61 is thus intended to remedy significant gaps in that regime that have prevented First Nations communities and governments from managing their own affairs effectively and responsibly, by providing tools that will enable First Nations communities to develop economically and to exercise autonomous decision-making power with reduced government involvement. For the government, the FNGA is also a pivotal component of a broader reform plan to modernize First Nations governance systems that includes the 1999 *First Nations Land Management Act* as well as anticipated fiscal legislation. It is not intended to replace the historical treaties, undermine ongoing treaty and self-government processes, or affect the government's fiduciary responsibilities toward First Nations people.

The Assembly of First Nations and other First Nations bodies representing regions across the country view Bill C-61 differently. In condensed form, some of their primary criticisms are that the bill: was drafted without consultation or consent following a flawed process; is based on subsection 91(24) of the 1867 Constitution, rather than on a rights-based approach under section 35 of the *Constitution Act, 1982*; represents an attack on historical

treaties and a threat to the inherent right of self-government under section 35; imposes more bureaucratic control over the lives of First Nations people without resolving long-standing social and economic issues; fails to address urgent needs of First Nations communities in matters such as health, housing and employment, or the concerns of First Nations women; imposes a one-size-fits-all approach with numerous additional requirements for all First Nations communities and no parallel commitment to provide necessary resources or supports; serves the interests of government by off-loading federal responsibility; increases the costs of governance for First Nations communities; and fails to provide measures that would enable First Nations communities to develop their economies.

Specific criticisms of the bill relate, first, to the absence of a non-derogation clause. Inclusion of such a provision is seen as a fundamental requirement in the first major reform of the *Indian Act* since section 35 came into effect in 1982. Other areas of concern raised by First Nations spokespersons, often from a capacity/cost perspective, include the 25% threshold for code adoption (clause 4); legislating authority for ministerial interventions in First Nations communities' financial affairs (clause 10); the requirement that all communities create a redress mechanism (clause 11); the legal capacity clause (clause 15); the enforcement provisions, particularly measures authorizing search and seizure (clauses 19-29); preservation of ministerial authority in election appeals (clause 32); and the repeal of section 67 of the CHRA (clause 41).

At its Annual General Assembly (AGA) in July 2002, the AFN confirmed its position on Bill C-61 in a resolution condemning the legislation as a violation of the inherent right of self-government and committing the AFN to oppose it. The resolution called upon AFN Chiefs to ensure this opposition is heard, including through the parliamentary process. A separate resolution gave notice of First Nations' intention "to strengthen and sustain our own systems of governance, to enact and enforce our own laws without interference from federal government and legislative policies and regulations". The AGA endorsed the February 2002 *First Nations Plan* as an alternative to Bill C-61.

On 15 July 2002, David Ahenakew, former AFN National Chief and chair of the Federation of Saskatchewan Indian Nations Senate, initiated a Federal Court challenge to Bill C-61, alleging, *inter alia*, that the FNGA process has breached the government's fiduciary duties toward First Nations and seeking, among other remedies, an injunction prohibiting the bill's passage. The lawsuit has the support of the AFN.

First Nations opposition to Bill C-61 is not universal. The National Chief of the Congress of Aboriginal Peoples described the legislation as a move to address obsolete sections of the *Indian Act*, and as positive for the CAP constituency, providing off-reserve members the means and process to exercise their right to vote in band elections. According to the President of the National Aboriginal Women's Association, positive aspects include the bill's human rights protections, which will improve the lives of women on reserves, and band councils' authority to pass laws without ministerial interference. Individual First Nations members have expressed support for the legislation's accountability provisions, in particular, or, more generally, for its practical solutions. Others, acknowledging proposals such as removal of the CHRA exemption, consider that positive steps have been undone by bad process.

Non-Aboriginal editorial opinion, although mixed, has tended to favour the FNGA, describing the bill as "a promising start", "necessary and overdue", setting "the right course", "a straightforward, sensible outline", "addressing native grievances", "[providing] a better framework" for First Nations governments and not to be feared by them. It has also been suggested that although the bill has important positive effects, the government should admit that it "really is about assimilation". Less positive commentary has observed that because drafting the FNGA was neither collaborative nor inclusive, the bill should be allowed to die to enable government and First Nations to resume discussions to resolve outstanding issues, and that the Minister has "lost any hope of winning the support" of the Chiefs for the FNGA.

Available commentary from the academic sector, also mixed, has tended to be more critical of Bill C-61.

APPENDIX

SELECTIVE OVERVIEW OF *INDIAN ACT* HISTORY

SELECTIVE OVERVIEW OF *INDIAN ACT* HISTORY*

1876 to 1985

The first consolidated *Indian Act* (the Act) enacted in 1876 reflected the government's preoccupation with land management, First Nations membership and local government, and its ultimate goal of total assimilation of Canada's Aboriginal population. Despite frequent modifications over the period from 1876 to 1951 in areas such as settlement of western reserves, leadership selection,(1) enfranchisement(2) and prohibition of traditional practices, its underlying principles related to civilizing, assimilating and protecting Indians remained unchanged.(3) The amendments in question generally increased government control over and reduced autonomy for Indian bands.

From 1946 through 1948, a Special Joint Committee of the Senate and House of Commons reviewing the Act heard of poor living conditions, government intrusion in band affairs, unmet treaty obligations and other concerns. Its ensuing report reflected few Indian priorities; the Committee proposed revising the Act "to remove many of its coercive measures without altering its assimilative purpose."(4) In the result, the amended 1951 Act did not differ a great deal from its predecessor, preserving its key elements while reducing the role of the Minister of Indian Affairs (Minister) in band government somewhat and increasing autonomy in reserve management.

Participants in consultations on possible further revisions to the Act in the 1960s stressed the need to honour special rights, address historic grievances and allow greater Indian

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* This overview draws heavily on previously prepared documents by the author and by former Parliamentary Research Branch analyst Jill Wherrett.

(1) The evolution of the Act's system of elective government is summarized in a 1991 paper prepared by Wendy Moss (Cornet) and Elaine Gardner O'Toole entitled *Aboriginal People: History of Discriminatory Laws*, BP-175E, Parliamentary Research Branch, Library of Parliament.

(2) This process by which an Indian gave up Indian status and band membership was abolished by 1985 amendments.

(3) See J. Leslie and R. Macguire, *The Historical Development of the Indian Act*, 2nd ed. (Ottawa: Department of Indian Affairs and Northern Development, 1979); W. Daugherty and J. Madill, *Indian Government Under Indian Act Legislation 1868-1951* (Ottawa: Department of Indian Affairs and Northern Development, 1980); J. Taylor, *Canadian Indian Policy During the Inter-War Years, 1918-1939* (Ottawa: Department of Indian Affairs and Northern Development, 1984).

(4) J. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), p. 221.

involvement in policy-making.[5] Instead, the government issued its 1969 White Paper on Indian Policy, which was withdrawn in 1971 in light of First Nations groups' rejection of the policy's proposed repeal of the Act and termination of distinct "Indian" legal status.

Aboriginal and treaty rights were recognized and affirmed in section 35 of the *Constitution Act, 1982*. In 1983, a Special Committee of the House of Commons conducted a landmark study of Indian self-government. Indians appearing before the Penner Committee criticized the Act, *inter alia*, because it lacked measures enabling them to manage their own communities, while the then Minister listed government authority over band powers and assets; limitations on reserve land use; and the ambiguous legal status of bands among the Act's constraints. The Committee concluded that the Act's policy basis was "antiquated", proposed that a framework for self-government be legislated and recommended against amending the Act as an approach to self-government.[6]

1985 to 1997[7]

Enacted in 1985, Bill C-31 aimed to eliminate discrimination based on gender and marital status in the Act's registration provisions,[8] reinstate or recognize those who had been excluded from status under those provisions, and empower bands, for the first time, to assume control over their membership.[9] Bill C-31 also increased bands' by-law authority over, for example, residence on and development of reserve lands. Ensuing rapid growth in the status Indian population, with increased demands upon community and government resources, and varying capacities to transmit status to offspring owing to different categories of registrant are

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(5) S. Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1968 – 1970* (Toronto: University of Toronto Press, 1981), p. 5.

(6) House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee*, Minister of Supply and Services, Ottawa, 1983.

(7) Developments of recent years related to the Act and not discussed in this paper are surveyed in a June 2001 Parliamentary Research Branch paper prepared by the author entitled *The Indian* Act, TIPS-17E, revised in June 2001, on-line at http://lpintrabp/apps/tips/tips-cont.asp?Language=E&Heading=14&TIP=47.

(8) The intention was to bring the Act in line with the equality rights guarantees in section 15 of the *Canadian Charter of Rights and Freedoms*, which came into effect in April 1985.

(9) Previously, the sole requirement for band membership was Indian status. Within certain prescribed limits, Bill C-31 authorized bands to define their own membership criteria.

among Bill C-31's ongoing controversial effects. Those associated with the bill's membership provisions also persist.[10]

A multi-phased review of the Act from 1986 to 1990 that featured some consultation with Indian organizations focused on a number of areas for reform, with a view to proposing optional legislative changes that would enable individual bands to decide when they were ready to take on increased responsibility.[11] As the broader review continued, the 1988 "Kamloops Amendment" (Bill C-115) clarified the status of conditionally surrendered or "designated" reserve lands and granted band councils taxation authority. In 1993, DIAND-supported working groups of chiefs narrowed the range of priorities for legislative action that bands might opt into to three areas: lands, forestry and moneys. The 1999 *First Nations Land Management Act* is the only one of these initiatives to have resulted in final legislation to date.[12]

In April 1995, the then Minister embarked on a process to amend the Act, assuring leaders that only changes with First Nations support would proceed.[13] Strong negative reactions to September 1996 proposals from segments of First Nations leadership resulted in some pre-introduction revision to Bill C-79, the Indian Act Optional Modification Act, which was tabled in the House of Commons in December 1996. As its title implies, the bill would have allowed bands to opt into – but not out of – its package of changes to the Act. These related to, *inter alia*, reserve lands, bands' legal capacity, band council elections and law-making authority and rules of succession. In the constitutional context in which its changes were being proposed, Bill C-79 also contained a non-derogation clause under which neither the Act nor the amendments were to be construed as abrogating or derogating from existing Aboriginal and treaty rights, including the inherent right of self-government.

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(10) A constitutional challenge to Bill C-31's membership scheme has been in effect since 1986: *L'Hirondelle* v. *Canada*, Federal Court of Canada File Nos. T-66-86 A and B, or *Sawridge Band* v. *Canada* (commonly known as the Twinn case).

(11) See DIAND, *Lands Revenues and Trusts Review: Phase I Report* (Ottawa: Ministry of Supply and Services, 1988) and *Phase II Report*, 1990.

(12) S.C. 1999, c. 24. The legislation and background to it are discussed in an October 1998 document prepared by Jill Wherrett, then of the Parliamentary Research Branch, and entitled *Bill C-49: An Act providing for the ratification and the bringing into effect of the Framework Agreement on First Nation Land Management*, LS-324E, Parliamentary Research Branch, Library of Parliament. Under this legislation, land-related provisions of the Act cease to apply to signatory First Nations communities that adopt prescribed land codes. As of July 2002, 5 of 14 participating communities had done so.

(13) Possible amendments circulated to First Nations leaders in September 1995 related to reserve lands, natural resources, estates, Indian moneys, elections, by-laws and education.

Following first-reading debate, the House of Commons Standing Committee on Aboriginal Affairs and Northern Development held hearings on Bill C-79 from February through April 1997. In the main, First Nations representations rejected the bill on process and substantive grounds. Common general concerns related to the pre-legislation consultation process; differing First Nations priorities; retention of ministerial powers; potential effects of opting in; effects on First Nations' inherent right of self-government and constitutionally protected Aboriginal and treaty rights; and the Crown's fiduciary obligations toward First Nations. Concerns with specific aspects of the bill included its low opt-in threshhold and definition of bands' legal capacity.(14) Bill C-79 died on the Order Paper in spring 1997.

The November 1996 RCAP Report recommended enactment of an Aboriginal Nations Recognition and Government Act, which

> [s]hould amend the [Act] to clarify that [its provisions] would apply to a recognized Aboriginal nation exercising powers under section 35 of the *Constitution Act, 1982*, but only to the extent the nation wishes.
>
> We make no particular recommendation regarding the amendment or repeal of the [Act]. The future of this act, and particularly the issue of lands, resources and the fiduciary obligation that attaches to reserve lands under the [Act], are matters that should be subject to negotiations. As a practical matter, withdrawal from the [Act] regime should be phased to provide an appropriate transition period for bands that become part of recognized Aboriginal nations [under a proposed Aboriginal Nations Recognition and Government Act].(15)

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(14) Bill C-79 and related Committee proceedings are reviewed in an April 1997 paper prepared by the author and entitled *Bill C-79: An Act to permit certain modifications in the application of the Indian Act to bands that desire them*, LS-280E, Parliamentary Research Branch, Library of Parliament.

(15) Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Volume 2, *Restructuring the Relationship*, Part One (Ottawa: Ministry of Supply and Services, 1996), p. 319.